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PERSPECTIVE

A small bright line in the murky law of no contest clauses

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No contest clauses, those *in terrorem* provisions built into wills and trusts to discourage disgruntled heirs from contesting, have been a fixture in California's estate planning profession for more than a hundred years. But courts have struggled with the enforceability of such clauses, torn between competing public policy considerations. They are favored because they discourage litigation and act to carry out a testator's testamentary intentions, but at the same time disfavored for resulting in forfeitures and inhibiting access to courts by heirs who seek redress of wrongs committed by those who take advantage of the infirm and elderly. In balancing these conflicting interests, California courts have recognized the enforceability of no contest clauses while strictly construing their terms. Thus those who unsuccessfully challenge the validity of estate planning documents on the basis of lack of capacity, undue influence or fraud run the risk of forfeiting what they would otherwise have received.

Cases dealing with no contest clauses date to at least *In re Estate of Hite* (1909) 155 Cal. 436, where the court stated "And when a testator declares in his will that his several bequests are made upon the condition that the legatees acquiesce in the provisions, the courts, rightly hold that no legatee, without compliance with that condition, shall receive his bounty, or be put in a position to use it in the effort to thwart his expressed purposes."

Id. at 441. See also *Donkin v. Donkin* (2013) 58 Cal.4th 412, *Burch v. George* (1994) 7 Cal. 4th 246.

No contest clauses come in all shapes and sizes, from a single paragraph to a dozen pages, and courts have found their enforcement to be a challenge. Following

after an opportunity for further investigation or discovery. This low bar undoubtedly emboldened litigants who felt the softly defined restriction easily satisfied.

In the recent case of *Meiri v. Shamtoubi* (2022) 81 Cal.App.5th 606, the Court of Appeal has given

dren following their deaths. They amended the trust in 2014, under the terms of which on the death of the second spouse the remainder of the estate was distributed unequally among the four children to account for gifts and loans to two of the children, including the liti-

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a study in 2008, the California Law Revision Commission recommended the partial codification of California's common law rules regarding the enforcement of no contest clauses, with changes believed to improve the existing law. The following year the Legislature enacted Probate Code Sections 21310, *et seq.* which continued to generally recognize no contest clauses as enforceable, but incorporated several express limitations based on principles of existing law. Contests were typed into "direct contests," those alleging forgery, lack of due execution, undue influence, lack of capacity and the like, and those that practitioners began to refer to as indirect contests, being actions that sought to defeat a testator's wishes by the filing of creditor's claims or a challenge to the ownership of property by a trust or estate. Further, direct contests would not result in forfeiture if brought with probable cause, defined in Section 21311 (b) as facts which, at the time of filing, would cause a reasonable person to believe that there is a reasonable likelihood that the requested relief would be granted

practitioners some clarity in determining both if a challenge constitutes a "direct contest," and therefore is subject to the probable cause requirement to avoid forfeiture, as well as if a contest was brought with that requisite probable cause. In *Meiri*, parents Tale and Iraj created a trust in 1994 for the benefit of their four chil-

gant daughter Meiri. The trust amendment contained a no contest clause. When the father, Iraj, died in 2016 his share of the trust became irrevocable, and the required notification under Probate Code Section 16061.7 was sent out to the four children as beneficiaries.

A notification under Probate Code Section 16061.7 is required

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whenever a trust or portion thereof becomes irrevocable and advises heirs and beneficiaries that they have 120 days to challenge the validity of the document. Failure to bring a challenge within that statutory period forecloses a later action under Probate Code Section 16061.8. The notification is required to be given within sixty days of the event resulting in irrevocability, in this case the death of Iraj, and no recited facts disclose why the notice was not given until two years later in 2018. It is not uncommon for such notices to be dispensed with when there is a surviving spouse, as contests on the first death are uncommon. In this case it may have been ultimately given when one or more of the children began to express dissatisfaction with the terms of the trust.

In any event, in 2019 Meiri filed an action seeking, among other things, the invalidation of the amended trust. But her action was not filed until 230 days after the notification under Section 16061.7, clearly well beyond the 120-day limitation, which Meiri did not dispute. The court sustained Tale's demurrer to Meiri's petition, and Tale subsequently petitioned for instructions as to whether Meiri's challenge to the amendment's validity violated the trust's no contest clause.

In deciding that Meiri's challenge did trigger the no contest clause, the court first determined that, contrary to Meiri's arguments, a contest outside of the 120-day limitation may still be a "direct contest" governed by Section 21311 (b). Meiri argued that her litigation could not be a direct contest because it was not timely, relying upon *Estate of Lewy* (1974) 39 Cal. App.3 729 and *Estate of Crisler* (1950 97 Cal.App.2d 198. In *Lewy*, a suit did not trigger the no contest clause where the litigant challenged the capacity of the executrix of the estate. In *Crisler*, the no con-

test clause was not triggered when the litigant disputed the court's jurisdiction to probate a will. The *Crisler* court noted that the time to file a contest had expired, but that fact was not the primary consideration for the court's ruling. Accordingly, the court in *Meiri* distinguished these precedents from the instant case because, unlike Meiri's challenge, neither of those challenges sought to invalidate the will, but instead sought other forms of relief. Therefore, the existence of a direct contest hinges not on the form or title of the challenge, but on the challenge's substantive allegations and the relief sought. The cases Meiri relied upon also both predate the 2010 revisions to the Probate Code, which carefully balanced policy and the importance of testamentary intent against access to the courts to redress wrongs. As the *Meiri* court notes, if an untimely challenge was truly never a direct contest, "any litigant could easily circumvent these policy judgments...by filing a grievance...after the 120-day window." *Meiri* at 616.

Having decided that Meiri's petition did constitute a direct challenge, the court proceeded to determine whether it was brought without probable cause because it was brought outside the 120-day statutory window. As stated above, Section 21311 defines probable cause as requiring that "facts known to the contestant would cause a reasonable person to believe that there is *reasonable likelihood* that the requested relief will be granted..." Cal. Prob. Code § 21311, subd. (b), italics added. Because the statute's definition of probable cause requires a court to test the likelihood of relief, the court concluded that it must look beyond a challenge's substantive allegations to consider the petition's procedural posture as well. In this case, because Meiri's allegations of lack of capacity, undue influence, and fraud were filed

untimely, there was never any reasonable likelihood of relief from the start. Therefore, the court determined, the contest was definitionally without probable cause. The contestant's argument that she was nonetheless entitled to a hearing on the merits of her case were rejected. The court considered commentary from the Law Revision Commission on this point as well. In particular, the commentary indicates that the Commission believed a rule focusing only on factual allegations "did not go far enough." *Meiri* at 617. By incorporating procedure as well as substance, the court created a clear rule applying a no contest clause where the contest is not timely, no matter the merit of the facts alleged. This is consistent with the statute's policy judgment of avoiding unnecessary litigation and its associated harms.

The court also specifically rejected Meiri's attempt to analogize to the probable cause standard to that for malicious prosecution. In that context, there are separate and distinct policy judgments surrounding access to the courts for violations for tort injuries. These separate judgments inform the standard for probable cause in malicious prosecution actions, which primarily relate to personal injury cases, but have no bearing on the enforcement of a no contest clause in a probate proceeding. Additionally, Law Revision Commission commentary specifically notes that the standard applicable to malicious prosecution actions was "too forgiving" because "general law already provides sanctions for frivolous actions." *Id.* at 618 (quoting 37 Cal. Law Revision Com. Rep. (2007) p. 398). In support of the law's interest in donative intent, the legislature sought to define probable cause more narrowly than in other contexts.

In sum, *Meiri* clarifies two questions that practitioners have had regarding the applicability of no

contest clauses. First, the court articulates that a "direct contest" under Section 21311(a)(1), is determined by looking at the substance of the allegations and the type of relief sought. A contest is deemed direct if it seeks to invalidate an estate planning document, regardless of whether it is brought within the 120-day limitations period. Second, the court clarifies that Section 21311(b)'s probable cause standard incorporates procedural hurdles as well as legal reasonability. As a result, where no relief is possible because the petition is untimely, there is no probable cause, and a no contest clause is triggered. In doing so, the court has drawn a bright-line rule in an otherwise-murky analysis hinging on a reasonable person's belief as to the reasonable likelihood of relief.

While timeliness is a primary procedural requirement in all contests, other statutory elements exist. Pleadings must be verified under Section 1021, and to avoid a demurrer and dismissal a pleading must contain essential allegations, including grounds of opposition and a pecuniary interest in the estate sufficient to establish standing. *Estate of Horn* (1990) 219 CA3d 67; *Estate of Lind* (1989) 209 CA3d 1424. Similarly, failure to plead ultimate facts can be the subject of a demurrer. *Estate of Bixler* (1924) 194 C. 585; Rutter, *California Practice Guide Probate*, Ross & Cohen, 15:195. Some of these defects may be curable with or without leave of the court. But *Meiri* guides practitioners that the probable cause standard under 21311 (b) applies to procedural errors, potentially triggering no contest penalties, even where the facts of the case are meritorious, and should elevate attention to care and caution in contest litigation.

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